APPEAL AND ERROR—ORDER VACATING A DEFAULT JUDGMENT.—Where the defendant at a term of the court subsequent to the one during which a judgment by default had been entered against him, made a motion to vacate said judgment on account of alleged errors in fact, the question was whether an order setting aside the default and judgment was a final order from which an appeal could be prosecuted. *Held,* appealable. *Cramer* v. *Illinois Commercial Men's Association,* (Ill. 1913) 103 N. E. 549.

There is considerable conflict upon this proposition, but it is believed that in the absence of express statutory regulation of the subject the weight of authority is contrary to the decision in the principal case. *Thomas* v. *Thomas,* 10 Colo. App. 170; *Owen* v. *Going,* 7 Colo. 85; *Meloy* v. *Grant,* 4 Mackey (D. C.) 486; *Spaulding* v. *Thompson,* 12 Ind. 477, 74 Am. Dec. 221; *Masten* v. *Indiana Car Co.,* 19 Ind. App. 633; *Kermeyer* v. *Kansas Pac. R. R. Co.,* 18 Kans. 315; *Fortin* v. *Randolph,* 11 Mart. (La.) 268; *Woodcock* v. *Parker,* 34 Me. 593; *Wade* v. *DeLeyer,* 63 N. Y. 318; *Miller* v. *Tyler,* 58 N. Y. 477; *Reitmeir* v. *Siegmund,* 13 Wash. 624; *Carroll* v. *Vaughn,* 48 Ala. 352; *Hume* v. *Bowie,* 148 U. S. 245. The remedy of the opposing party under such circumstances is to proceed no farther, but suffer final judgment to be taken against him and appeal therefrom. *Domitski* v. *American Linseed Co.,* 221 Ill. 161; *Hirsh* v. *Weisberger,* 44 Mo. App. 507; *List* v. *Joeheck,* 45 Kans. 349; *Moore* v. *Hill,* 87 Ga. 91. Several courts, however, regard such an order as final and appealable. *People's Ice Co.* v. *Schlenker,* 50 Minn. 1; *Ballard* v. *Purcell,* 1 Nev. 290; *Deering* v. *Quivey,* 26 Or. 556; *Carney* v. *Railroad,* 15 Wis. 503; *Tidwell* v. *Witharspoon,* 18 Fla. 282; *Johnson* v. *Parrotte,* 34 Nebr. 26. In Ohio the same result has been reached by reason of the liberal construction of a statute covering the subject of appeals. *Braden* v. *Hoffman,* 46 Oh. St. 639. The decision in the principal case is especially noteworthy from the fact that it seems to overrule or at least to restrain within very narrow limits the case of *Walker* v. *Oliver,* decided by the same court in 63 Ill. 199, which case was cited with approval in the recent case of *People* v. *Wells,* 255 Ill. 450. The court attempts to distinguish the two cases on the ground that where the error for which the judgment is vacated is one of fact the order is appealable, whereas if the mistake is one of law, as in *Walker* v. *Oliver,* it is not appealable. The same distinction is pointed out in *Hirsch* v. *Weisberger,* 44 Mo. App. 507. This distinction does not seem to be well founded for the reason that the question as to whether an order is final and appealable depends upon its character with reference to the effect which it has upon the rights of the parties, and not upon the intrinsic nature of the error upon which it is predicated.

BAILMENTS—RIGHT OF BAILEE FOR HIRE TO STIPULATE AGAINST LIABILITY FOR NEGLIGENCE, NOT AMOUNTING TO WILLFUL MISCONDUCT OR FRAUD.—The defendant, for a suitable consideration, stored the automobile of the plaintiff, the latter assuming risk of injury to the machine. The pressure of snow, which the defendant negligently allowed to accumulate, caused the roof to give way, and fall upon the machine. The plaintiff brought suit for the damage. *Held,* that recovery could be had, the stipulation relieving the bailee

from liability for negligence being ineffectual. *Pilson* v. *Tip-Top Auto Co.* (Ore. 1913) 136 Pac. 642.

In reaching a decision, the court seems to have lost sight of the distinction between a common carrier and an ordinary bailee for hire. There is no doubt that a provision in a contract, attempting to relieve a common carrier from liability for its negligence is invalid: *Rd. Co.* v. *Lockwood,* 17 Wall. 357; *Pittsburg, etc. Ry Co.* v. *Higgs,* 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081. But, as a general rule, an ordinary bailee for hire can make a valid contract, excusing it from any liability, except that caused by its own gross negligence or fraud: *Gashweiler* v. *Wabash, etc. R. Co.,* 83 Mo. 112, 53 Am. Rep. 558; *Alexander* v. *Greene,* 3 Hill 9; *Wells* v. *Steam Nav. Co.,* 2 N. Y. 204; *Coffield* v. *Harris,* 2 Wilson (Tex.) sec. 315. The reason for the distinction is that the ordinary bailee, unlike the common carrier, is as fully at liberty to refuse employment as is a day laborer, and may, like him, settle the terms upon which his services shall be rendered, with the exception above noted. The instant case cites a number of authorities in support of the proposition advanced, but all except *Lancaster Co. Nat. Bk.* v. *Smith,* 62 Pa. St. 47, are cases where the party at fault was a common carrier. This last case, cited in 3 Am. & Eng. Enc. (2 Ed.) 750, for the same proposition, may be readily distinguished. The defendant there was a gratuitous bailee, and only liable for gross negligence, which it is admitted cannot be excused by contract. The principal case apparently takes a unique position, opposed to the general rule as stated above.

BANKRUPTCY—FALSE REPRESENTATION—WAIVER OF FRAUD—In a suit upon an account the defendants pleaded a discharge in bankruptcy. It was conceded that the plaintiff had proved its debt in a court of bankruptcy and received a dividend. The plaintiff offered evidence to prove that credit was extended to the defendants because of certain false representations made to it by the defendants at the time of the sale. *Held,* that the plaintiff, though it had chosen to enter the bankrupt court and take its place with the other creditors, and had received a dividend, did not thereby waive the fraud in the purchase of the goods and stand on the contract so that the discharge in bankruptcy was a bar. *J. K. Orr Shoe Co.* v. *Upshaw & Powledge* (Ga. 1913), 79 S. E. 362.

It must now be taken as settled that a creditor is not bound to elect which remedy he will pursue against the bankrupt on a contract where the right to sue in tort also exists; nor does he waive the right to sue on a tort for a balance of his claim by accepting his dividend under a composition. *Friend* v. *Talcott,* 228 U. S. 27. The court in the principal case based its opinion on that decision. But there have been conflicting views upon this question, and many of them in very recent cases. *Tindle* v. *Birkett,* 205 U. S. 183. The question arises under Sec. 17, (a), Bankruptcy Act 1898, which provides that a discharge in bankruptcy shall not release a bankrupt from liabilities for obtaining property under false pretenses or false representations. The argument that such a creditor, after proving his contract, voting in creditors' meetings, and thus influencing their actions to that ex-